

STATE OF MICHIGAN
COURT OF APPEALS

NEIL SWEAT,

Plaintiff-Appellee,

v

DETROIT HOUSING COMMISSION,

Defendant-Appellant.

UNPUBLISHED

May 14, 2020

No. 347642

Wayne Circuit Court

LC No. 12-005744-CD

Before: JANSEN, P.J., and METER and CAMERON, JJ.

PER CURIAM.

Defendant, Detroit Housing Commission, appeals by leave granted an order denying its motion for summary disposition of plaintiff Neil Sweat’s breach-of-contract claim.¹ We reverse and remand for proceedings consistent with this opinion.

This case arises out of two disciplinary actions initiated by defendant against plaintiff, its former employee. Plaintiff first filed grievances against defendant with his labor union, the American Federation of State, County, and Municipal Employees, Council 25, Local 2394 (“the union”). Plaintiff then filed separate charges with the Michigan Employment Relations Commission (“MERC”) against defendant and the union, which were consolidated. While plaintiff’s charges were pending in the MERC, plaintiff filed a civil action against defendant in circuit court. At issue in this appeal is plaintiff’s breach-of-contract claim against defendant, alleging breach of a collective-bargaining agreement. In its third motion for summary disposition, defendant argued that plaintiff’s breach-of-contract claim was precluded by the MERC action in which it was determined that the union did not breach its duty of fair representation. The trial court disagreed, found that there was a genuine issue of material fact regarding whether defendant breached the collective-bargaining agreement, and denied defendant’s motion for summary disposition. This appeal followed.

¹ See *Sweat v Detroit Housing Comm*, unpublished order of the Court of Appeals, entered May 23, 2019 (Docket No. 347642).

Defendant argues on appeal that the trial court erred by failing to dismiss plaintiff's breach-of-contract claim on the basis of the doctrine of collateral estoppel because the question of whether the union breached its duty of fair representation is essential to plaintiff's breach-of-contract claim and that issue was actually litigated and determined before the MERC. We agree.

This Court reviews de novo a trial court's ruling on a motion for summary disposition, as well as the application of the doctrine of collateral estoppel. *William Beaumont Hosp v Wass*, 315 Mich App 392, 398 n 4; 889 NW2d 745 (2016). "In determining whether summary disposition under MCR 2.116(C)(7) is appropriate, a court considers all documentary evidence submitted by the parties, accepting as true the contents of the complaint unless affidavits or other appropriate documents specifically contradict them." *Garrett v Washington*, 314 Mich App 436, 441; 886 NW2d 762 (2016) (quotation marks and citation omitted).

The doctrine of collateral estoppel "requires that (1) a question of fact essential to the judgment was actually litigated and determined by a valid and final judgment, (2) the same parties had a full and fair opportunity to litigate the issue, and (3) there was mutuality of estoppel." *Estes v Titus*, 481 Mich 573, 585; 751 NW2d 493 (2008) (citation omitted). The "'full and fair opportunity to litigate' normally encompasses the opportunity to both litigate and appeal[.]" *Monat v State Farm Ins Co*, 469 Mich 679, 685; 677 NW2d 843 (2004).

[M]utuality of estoppel requires that in order for a party to estop an adversary from relitigating an issue that party must have been a party, or in privity to a party, in the previous action. In other words, [t]he estoppel is mutual if the one taking advantage of the earlier adjudication would have been bound by it, had it gone against him. [*Id.* at 684-685 (quotation marks and citations omitted).]

When a defendant seeks "to preclude relitigation on the basis of an administrative decision, three additional requirements must be satisfied. The administrative determination must have been adjudicatory in nature and provide a right to appeal, and the Legislature must have intended to make the decision final absent an appeal." *Nummer v Dep't of Treasury*, 448 Mich 534, 542; 533 NW2d 250 (1995).

Preliminarily, plaintiff does not dispute that the MERC decision was a valid and final judgment, that the same parties were involved in the MERC action, or that mutuality of estoppel exists.² Furthermore, it is clear that the issue of whether the union breached the duty of fair representation is a question of fact essential to any judgment on plaintiff's breach-of-contract claim because an aggrieved employee cannot maintain an action against his or her employer for breach of contract unless it is first demonstrated that the union breached its duty of fair representation. See *Knoke v East Jackson Pub Sch Dist*, 201 Mich App 480, 485; 506 NW2d 878 (1993); *Saginaw*

² Although separate charges were filed against the union and defendant, the charges were consolidated and the decisions of the administrative law judge ("ALJ") were issued contemporaneously. Moreover, mutuality is not required where collateral estoppel is asserted defensively against a party who has had a full and fair opportunity to litigate the issue. *Monat*, 469 Mich at 695. In this case, defendant has asserted collateral estoppel defensively against plaintiff, who was a party in the MERC action.

v Chwala, 170 Mich App 459, 464-465; 428 NW2d 695 (1988); *Pearl v Detroit*, 126 Mich App 228, 238-239; 336 NW2d 899 (1983). In addition, there is no dispute that the additional requirements that must be satisfied in order to preclude relitigation on the basis of an administrative decision are satisfied, i.e., the administrative determination was adjudicatory in nature and provided a right to appeal, and the Legislature intended to make the decision final absent an appeal.

The questions in dispute are whether the issue regarding the union's breach of the duty of fair representation was "actually litigated and determined" in the prior judgment and whether plaintiff had "a full and fair opportunity to litigate the issue." *Estes*, 481 Mich at 585. As this Court concluded in a prior appeal of this case, "the agency limited its findings of fact and conclusions of law to those necessary to determine whether the union breached the duty of fair representation." *Sweat v Detroit Housing Comm*, unpublished per curiam opinion of the Court of Appeals, issued March 20, 2018 (Docket No. 337597), p 4. It is clear from the opinion of the ALJ, as well as the decision by the MERC, that the issue of whether the union breached its duty of fair representation was determined, and that determination was also affirmed by this Court on appeal. *AFSCME Council 25 Local 2394 v Sweat*, unpublished per curiam opinion of the Court of Appeals, issued February 2, 2016 (Docket No. 323933), pp 5-6. Plaintiff, however, argues that three particular breaches by the union were presented, but not litigated or decided by the ALJ. Plaintiff claims that the questions (1) whether the union filed an untimely grievance, (2) whether the union ignored the grievance, and (3) whether the union refused to request evidence in bad faith were presented, but not litigated or decided. We disagree.

According to the ALJ's decision, plaintiff alleged in his charge that the union breached its duty of fair representation by failing or refusing to request information from defendant and by failing to notify plaintiff of the time and location of the grievance hearing. The ALJ stated in a supplemental position statement that plaintiff made clear that his claim against the union was based primarily on the union's handling of the 2008 grievance. According to the ALJ, plaintiff asserted that the union failed to process that grievance to arbitration, failed to properly investigate the circumstances that led to his 2009 discharge, and failed to file the 2009 grievance in a timely manner.

The ALJ concluded that there were no genuine issues of material fact and granted summary disposition in favor of the union. First, with regard to the union's decision not to further challenge plaintiff's suspension, the ALJ found that plaintiff had failed to present any evidence that the union's decision was anything other than reasonable. With regard to the 2009 incident, the ALJ again found no evidence establishing that the union should have advanced the grievance to arbitration. The ALJ further found that plaintiff's claim based on the union's failure to timely file the 2009 grievance was not timely asserted by plaintiff. The ALJ stated, however, that even if that claim had been timely raised, plaintiff failed to set forth a claim with regard to the timing of the filing of the grievance.

On appeal, the MERC affirmed the ALJ's findings and conclusions. In particular, it concluded that the union did not breach the duty of fair representation with regard to the handling of the 2008 grievance or the 2009 grievance, and plaintiff's claim that the 2009 grievance was filed late was itself untimely.

This Court affirmed the MERC's decision, concluding that plaintiff "failed to raise a genuine issue of material fact regarding whether [the union] breached the duty of fair representation." *AFSCME Council 25 Local 2394*, unpub op at 5. This Court concluded that plaintiff failed to establish that the union acted discriminatorily, arbitrarily, or in bad faith with regard to the 2008 grievance, requests for documentation, or the 2009 grievance. *Id.* at 5-6. This Court stated that, even if it were to presume that the union was negligent in its filing of plaintiff's grievance, "uncontroverted testimony revealed that the decision not to pursue the grievance came not from its untimely filing, but rather from [the union's] arbitration review panel which found that the grievance lacked merit." *Id.* at 6. Accordingly, it is clear that the three alleged breaches identified by plaintiff were previously litigated and determined in the agency action.

Plaintiff, however, also argues that the issue was not "fully and fairly litigated," and he claims that the MERC's finding that the union did not breach its duty of fair representation was based on the union's fraud on the court. According to plaintiff, the union committed fraud on the court by stating that the 2009 grievance was timely. Nonetheless, the ALJ found that even if the claim had been timely raised, plaintiff had failed to state a claim, and this Court reached the same conclusion. To the extent that plaintiff now asserts that the issues were not fully and fairly litigated because of other instances of fraud in the agency action, he fails to establish that any fraud occurred. Therefore, the issue regarding the union's breach of the duty of fair representation was actually litigated and determined by a valid and final judgment, and all of the elements of collateral estoppel were satisfied.

Plaintiff argued below and in his response to defendant's application for leave to appeal that defendant waived the affirmative defense of collateral estoppel. Plaintiff does not raise this issue in his brief on appeal, but instead now argues that defendant waived the substantive defense that the union did not breach its duty of fair representation. Nonetheless, we address the question of whether the defense of collateral estoppel is waived. It is true that defendant did not raise the defense of collateral estoppel in its first responsive pleading. See *Tuscany Grove Ass'n v Peraino*, 311 Mich App 389, 402 n 5; 875 NW2d 234 (2015) (stating that "by failing to include collateral estoppel and supporting facts in her first responsive pleading, defendant waived this affirmative defense"). However, defendant was unable to do so because the agency action was still pending at that time. The trial court allowed defendant to file its motions for summary disposition on the basis of the doctrine of collateral estoppel, including the motion at issue in this appeal, and heard arguments on those motions. Therefore, it appears that the trial court constructively allowed amendment of defendant's affirmative defenses. See *Cole v Ladbroke Racing Mich, Inc*, 241 Mich App 1, 10; 614 NW2d 169 (2000). Moreover, because plaintiff had an opportunity to brief the issue and was afforded an opportunity for oral argument in response to defendant's third motion for summary disposition, there was no prejudice to plaintiff from the amendment. See *id.*

Plaintiff also argues that the doctrine of res judicata precludes defendant from asserting the defense of collateral estoppel because it was not raised in the prior appeals. Generally, the doctrine of res judicata applies to separate lawsuits. See *Harvey v Harvey*, 237 Mich App 432, 437; 603 NW2d 302 (1999). However, it may apply where there has been a prior appeal by right from a final order. *Andrews v Donnelly*, 220 Mich App 206, 211; 559 NW2d 68 (1996); *VanderWall v Midkiff*, 186 Mich App 191, 198; 463 NW2d 219 (1990). A trial court may, however, grant "relief from judgment on the basis of issues which were not present at the time of the taking of the original appeal." *Id.* at 203.

Defendant previously moved for summary disposition on the basis of the doctrine of collateral estoppel, asserting that the MERC had found no genuine issue of material fact regarding whether defendant breached the collective-bargaining agreement. On appeal from the final order granting summary disposition, this Court ruled that collateral estoppel did not apply because the issue whether defendant breached the collective-bargaining agreement was not decided by the MERC. Plaintiff claims that defendant could have also argued in its prior appeal that collateral estoppel applied on the basis of the MERC's finding that the union did not breach the duty of fair representation. It is true that the issue would have been known to defendant at that time and *could* have been raised by defendant in the prior appeal; however, this argument was not the basis for summary disposition asserted by defendant or ruled on by the trial court. Thus, this question turns on whether defendant should have raised this alternative collateral estoppel argument in its prior motion for summary disposition. Again, it is evident that defendant *could* have raised this argument in its prior motion for summary disposition; however, there is nothing that required it to do so. "This Court has held that MCR 2.116(E)(3) allows a party to file more than one motion for summary disposition." *Limbach v Oakland Co Bd of Co Rd Comm'rs*, 226 Mich App 389, 395; 573 NW2d 336 (1997). Because defendant's prior motion for summary disposition was not based on the MERC's finding that the union breached the duty of fair representation, that issue was not present at the time of the prior appeal, and defendant was not required to raise it in that appeal. Therefore, the doctrine of res judicata does not bar defendant's assertion of collateral estoppel on the basis of the MERC's finding that the union did not breach the duty of fair representation. Because the doctrine of collateral estoppel applies in this case, the trial court erred by denying defendant's motion for summary disposition of plaintiff's breach-of-contract claim pursuant to MCR 2.116(C)(7).³

Reversed and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Kathleen Jansen
/s/ Patrick M. Meter
/s/ Thomas C. Cameron

³ Because summary disposition should have been granted under MCR 2.116(C)(7), we need not consider defendant's argument that summary disposition should have been granted under MCR 2.116(C)(10).